United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7161

ORIGINAL

To be argued by
ALFRED S. JULIEN

In The

United States Court of Appeals

For The Second Circuit

FLM COLLISION PARTS, INC.,

Plaintiff-Appellee-Cross-Appellant,

B

-against-

FORD MOTOR COMPANY and FORD MARKETING CORPORATION,

Defendants-Appellants-Cross-Appellees.

Appeal from the United States District Court for the Southern District of New York (C.D. 73 Civ. 713 (T.P.G.))

REPLY BRIEF FOR PLAINTIFF-APPELLEE-CROSS-APPELLANT

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REPLY BRIEF FOR PLAINTIFF-APPELLEE-CROSS-APPELLANT

Preliminary Statement

In light of certain statements made by the defendants-cross-appellees (Ford) in its briefs, the plaintiff-cross-appellant, FLM COLLISION PARTS, INC. (FLM) feels compelled to submit this short reply brief.

POINT I

THE CONTROVERSY BEFORE THIS COURT INVOLVES FORD'S DISTRIBUTION SYSTEM WITH REGARD TO CRASH PARTS AND HAS NOTHING TO DO WITH FORD'S METHOD OF DISTRIBUTING SPARK PLUGS OR OTHER AUTO PARTS WHICH ARE DISTRIBUTED UNDER A COMPLETELY DIFFERENT SYSTEM.

Ford, in all of the papers submitted to this Court has continuously and deliberately attempted to confuse the issues before the Court by making reference to certain alleged problems Ford was having in distributing auto parts such as spark plugs (p. 8-9 brief of defendants-appellants). On page 5 of its brief, as cross-appellee, Ford accuses FLM of being misleading in its brief when it states that FLM was the only independent wholesaler in the United States of which Ford's marketing personnel were aware. Ford then goes on to claim that there were thousands of independent wholesalers nationwide.

It should be made clear, so that there is no further misunderstanding, that the case now before the Court involves solely Ford's method of distributing crash parts. It does not involve Ford's method of distributing spark plugs, batteries, shock absorbers, or other automobile parts which are not crash parts.

Ford has two distinctly separate systems for its distribution of auto parts. One system involves the distribution of such parts as spark plugs, batteries and shock absorbers which are distributed through independent warehouse distributors as well as franchised Ford dealers.(1461)*

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* all page references are to the Joint Appendix unless otherwise indicated.

Ford has a distinctly different system for its distribution of crash parts which are distributed solely through franchised Ford dealers. (1463,899)

Our case deals solely with Ford's method of distributing crash parts. It has nothing at all to do with the manner in which Ford distributes auto parts other than crash parts through a system of independent distributors and wholesalers. FLM does not deal in Ford parts other than crash parts. Ford has continuously attempted to inject its distribution system of auto parts other than crash parts into this case with the obvious purpose of confusing the issues. Throughout the trial, the District Court continuously requested Ford's witnesses to direct their testimony to Ford's method of distributing crash parts in response to questions and not to respond with regard to Ford's method of distributing auto parts other than crash parts. (866,859)

This case deals solely with crash parts. FLM's briefs, unless specifically stating to the contrary, concern Ford's distribution system regarding crash parts and FLM's role as wholesaler in the distribution of crash parts. Rather than being misleading, FLM's statement that Ford was the only independent wholesaler in the United States, of which Ford's marketing personnel were aware when they changed the

wholesale incentive policy, so as to deprive FLM of the wholesale incentive allowance, the record clearly supports FLM's contention that there were no other crash parts wholesalers of which Ford was aware (814,970), and that Ford had FLM specifically in mind when it changed its wholesale allowance policy with regard to crash parts. (810,861,928)

The District Court made a specific finding of fact in its decision that Ford's revision of its wholesale incentive policy regarding crash parts was for the specific purpose of inhibiting sales to middlemen such as FLM and to discourage such middlemen from competing in the distribution of crash parts. (1629) It was Ford's system with regard to the sale of crash parts which the District Court had found to be violative of Section 2(a) of the Robinson-Patman Act.

POINT II

FORD'S WITHHOLDING OF THE WHOLESALE INCENTIVE ALLOWANCE FROM ITS FRANCHISED DEALERS ON SALES TO FLM WAS NOT A VALID FUNCTIONAL DISCOUNT AND WAS IN VIOLATION OF SECTION I OF THE SHERMAN ACT.

Ford in its brief, as cross-appellee, attacks FLM's contention that Ford's incentive allowance system violates Section I of the Sherman Act pursuant to the doctrine in United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

In Schwinn, the Court held that once a seller parts with title to its product, it may not restrict the

persons to whom or territories in which its customers may resell those products. Ford argues that since FLM continued to be able to purchase Ford crash parts from franchised Ford dealers, even after the wholesale incentive allowance was withheld from franchised dealers on sales to FLM, that there was no Schwinn violation.

Ford has misread the teachings of Schwinn. Schwinn cannot be obviated by the simple expedient of a supplier rather than totally prohibiting the persons with whom its customer may deal, simply charging its customers a radically different price, depending solely upon whom its customer resells to. If that were permitted, the entire Schwinn doctrine would become meaningless since a supplier would no longer have to prohibit its customers from dealing with any persons. The supplier would simply make it economically impossible for its customers to sell its product to persons whom it did not desire that they be sold to. In Klors, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959), the Supreme Court made it clear that a conspiracy not to sell or to sell only at highly discriminatory prices are one and the same.

Ford's permitting its franchised dealers to sell crash parts to FLM, but charging its franchised dealers 25%

more for all such sales, are precisely the type of sales at highly discriminatory prices which the Supreme Court in Klors found equivalent to a refusal to sell, and a violation of Section I of the Sherman Act.

Ford makes an additional argument that Section I of the Sherman Act was not violated because Ford's withholding of the wholesale incentive allowance from franchised dealers on sales to FLM constituted nothing more than an ordinary functional discount which is common in the market and permitted by Schwinn.

What Ford has obviously chosen to ignore is the District Court's clear finding which cannot be set aside unless it is clearly erroneous that Ford's withholding of the wholesale incentive allowance to its franchised dealers on the sale of crash parts to FLM is not a valid functional discount.

The District Court, in its decision, spent a great deal of time (1622-1633) in discussing Ford's functional discount argument. The District Court found that the basic test for the validity of functional discount is that set out by Rowe in his text Price Discrimination Under the Robinson-Patman Act (1962), the general principal being that a lower price is charged to a party nearer to the supplier and a

higher price is charged to a party on a level further from the supplier. As Rowe puts it:

> "In practice, the competitive effects requirement permits a supplier to quote different prices between different distributor classes -- so long as those who are higher up (nearer the supplier) on the distribution ladder pay less than those who are further down (nearer the consumer). Put another way, wholesalers or jobbers (or their equivalent) may receive greater discounts or lower prices than retailers or dealers -- so long as the wholesalers or jobbers sell only to retailers or dealers but not to consumers in competition with the retailers paying more." (at 174)

What Ford is doing in our case is precisely the opposite of what normal functional discounting is. Ford is charging its dealers less on sales to retailers and 25% more on sales to FLM. This is not valid functional discounting but an obvious predatory pricing scheme which the District Court found was created for the specific purpose of inhibiting sales to FLM and to discourage FLM from competing in the distribution of crash parts. (1629)

Ford's reliance upon Abbott Laboratories v. Portland Retail Druggist Association, Inc., 96 S. Ct. 1305 (1976) for the proposition that its wholesale incentive policy with regard to the distribution of crash parts is valid, is misplaced. What the Supreme Court said in Abbott, was simply that a

distributor performing a dual function would not necessarily have to be violating either Schwinn or the Robinson-Patman Act in providing an accounting to its supplier as to who it resold certain goods to for which goods it had received a favorable price for pursuant to the charitable exemption of 15 USC 13(c). Abbott was not intended to mean nor can it legitimately be read to mean that Ford can institute a predatory pricing system to prevent franchised dealers from selling crash parts to independent wholesalers and legitimize that predatory scheme simply by calling it a functional discount, and analogizing it to those situations where valid price differences exist because of a functional discount, charitable exemption under Section 2(c) of the Robinson-Patman Act or for other legitimate reasons.

What Abbott did say in no uncertain terms, is that the antitrust laws and the Robinson-Patman Act in particular, are to be construed liberally and that exceptions from their application are to be strictly construed. 96 S.Ct. 1305 at 1313. The Robinson-Patman Act does not contain any specific mention of functional discounts. A complete review of the authorities discussing functional discounting under the Robinson-Patman Act is found in FLM's brief to the District Court (1394-1409) and in the District Court's decision (1622-1633).

In a now classic article in the Harvard Law Review by Schniderman entitled "The Tyranny of Labels -- A study of

Functional Discounts Under the Robinson-Patman Act,"60 Harv. L. Rev. 571, 586-88 (1947), the author points out that functional discounts are the same as any other discounts under the Robinson-Patman Act and are not to be permitted unless they are cost justified.

Ford, during the trial of this action, admitted that cost justification was not even considered in granting the wholesale incentive allowance, this so-called functional discount to its franchised dealers. (876) Accordingly, even if Ford's wholesale incentive allowance were a valid functional discount, which the District Court found it is not, Ford would still have violated the Robinson-Patman Act since it was not cost justified. However, since the wholesale incentive allowance is not a valid functional discount, but instead is simply a subterfuge by which Ford is controlling the persons to whom its franchised dealers may resell crash parts, Ford, in addition, is in direct violation of Section I of the Sherman Act pursuant to the Schwinn doctrine.

POINT III

FORD IS INCORRECT IN CLAIMING THAT FLM DID NOT RAISE A SECTION 2(d) CLAIM PURSUANT TO THE FRED MEYER DOCTRINE IN THE COURT BELOW.

Ford, in its brief, contends that this Court may not

consider FLM's Section 2(d) claim as set forth in FTC v. Fred Meyer, Inc., 390 U.S. 341 (1968) because FLM did not raise that claim in the Court below.

FLM specifically raised the issue of Ford's liability to FLM under Section 2(d) of the Robinson-Patman Act under the Fred Meyer doctrine in the Court below (1395) and the District Court specifically considered FLM's contention in its decision (1621). FLM contends that the District Court erred in holding that the Fred Meyer doctrine had not been violated by Ford in our case, but Ford is simply wrong in stating that this Court may not consider FLM's Section 2(d) claim because it was not raised below.

CONCLUSION

Ford's predatory and discriminatory pricing scheme violated Section I of the Serman Act and Sections 2(a) and 2(d) of the Robinson-Patman Act.

The decision of the Court below finding that Ford had violated Section 2(a) of the Robinson-Patman Act should be affirmed. The decision of the Court below insofar as it found that Ford had not violated Section I of the Sherman

Act pursuant to the Schwinn doctrine, should be reversed.

Respectfully submitted,

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A 202 Affidavit of Personal Service of Papers

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Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, James A. Steele, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 310 West 146th Street, New York, New York

That on the 14th *day of* June *19* 76 *at* 48 Wall Street, New York, New York

deponent served the annexed Reply Brief *upon*

Sullivan & Cromwell
the Attorneys *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* herein.

Sworn to before me, this 14th
day of June *19* 76

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

James A. Steele
JAMES A. STEELE